

The Environment, Climate Change and Land Reform Committee
UK Withdrawal from The European Union (Continuity) (Scotland) Bill

Submission From:

Chartered Institute of Ecology and Environmental Management (CIEEM)

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Please respond by giving your views within the following headings—

Part 1: Alignment with EU Law

The environmental implications of the keeping pace power potentially leading to substantial policy divergence with the rest of the UK

- Whether having powers to keep pace, rather than a duty to do so, is the most appropriate way forward
- How keeping pace can be achieved, including within a common frameworks approach
- The voluntary approach to maintaining regulatory alignment with EU environmental law
- The limitation on the powers, including expiry after 10 years

The first part of the Bill, giving the Scottish Government the power to legislate to “keep pace” with developments in EU law, reflects its policy of “dynamic alignment” with EU law. The Scottish Government having the broad power to make regulations that match or implement new EU measures rather than a duty to do so is the most appropriate way forward. This will avoid the need for additional legislation where gaps in existing powers are found and reduce some of the complexities. Measures to ensure Scottish law can keep in line with those in Europe should only occur when it is appropriate, practicable to do so and in Scotland’s best interests. Whether new EU laws would become incorporated into Scottish law should be the subject of detailed consultation and parliamentary scrutiny.

The limitation of powers for 10 years, extendable in further spells of five years is fine as long as the annual report on its use provided to Parliament undergoes appropriate scrutiny in a timely manner.

Part 2 Environment: Chapter 1 - Environmental principles

- Whether the four principles are the right choice, correct set and whether other principles or high-level objectives should be included.
- Whether and how the principles should directly align to the statutory requirements to work to achievement of the Sustainable Development Goals and climate change duties
- The powers to alter and remove the principles
- The duty to have regard to the principles – the scope, extent and limitations of the duty and the exemptions
- The limit on the application of the principles to environmental policy and regulation and whether these should extend to all areas of policy and regulation
- Whether the list of statutory consultees is appropriate and whether it should be extended on the face of the Bill to include, for example, SEPA and SNH

- The interplay between principles set by UK for reserved functions, and those set in Scotland for devolved functions
- The process of development and parliamentary scrutiny of the guidance on principles and duties

CIEEM supports the four principles outlined in the Continuity Bill:

- Precautionary principle as it relates to the environment
- Polluter pays principle
- Prevention principle - preventative action should be taken to avert environmental damage
- Rectification at Source principle

All four principles must be applied when developing policies, including proposals for legislation, across all activities of local and central government.

We would like to see non-regression (using the IUCN definition) included as a principle. Non-regression is increasingly acknowledged as a key parameter in environmental decision-making as reflected by its inclusion in the proposed United Nations (UN) Global Pact for the Environment. There must be no rollback of environmental standards and Scotland's commitment to international agreements. On principles and standards, there must be no rollback on what Scotland accepts as best practice and minimum standards for the environment.

The duty should allow the inclusion of new principles as appropriate to allow Scotland to not only keep pace with EU developments but also incorporate international environmental principles to improve the existing biodiversity duty, for example by setting measurable targets, using recognised methods, to ensure positive benefits for biodiversity for new developments. The principles should directly align to the statutory requirements to work to the achievement of the Sustainable Development Goals and climate change duties and should complement the Environment Strategy for Scotland.

There should be the option to add or remove guiding principles, but only in full consultation with relevant stakeholders, the responsible authorities, and the independent environmental body.

We question the wording 'have regard to' in the following statement: "*The Scottish Ministers must, in developing policies (including proposals for legislation), have regard to the guiding principles on the environment.*" 'Have regard to' is not strong enough and does not reflect existing treaty commitments or meet current legislative background. We would like to see this changed to 'act in accordance with'.

Part 2 Environment: Chapter 2 - Environmental governance

The extent to which the proposals will address the governance issues arising from EU exit

- The limit of the obligations of 'public authorities' and the exclusions
- How the proposed model will align with that proposed for functions in the rest of the UK, and for reserved matters in Scotland, through the UK Environment Bill and any potential for gaps in the oversight arrangements; and the ability to co-operate and share data
- The proposed definitions including: public authority, environmental law, failure to comply with environmental law, the effectiveness of environmental law, environmental protection and environmental harm
- The proposed governance arrangements, and the procedures required to establish them – including the status and independence of the new public body (the ESS), its functions, powers, duties, structure, governance, membership and strategy
- How the proposals align with existing bodies with statutory functions relating to the environment, and other such oversight bodies such as the Scottish Information Commissioner, Audit Scotland and the Scottish Public Services Ombudsman
- Alternative approaches to environmental governance

When the UK exits the EU, the UK (and therefore Scotland) will no longer be subject to the powers of the European Commission (EC) and the Court of Justice of the European Union (CJEU). This will leave a governance gap. A new or existing body will need to fill this function to hold Scottish Government to account on its environmental performance. We are thus pleased to see the proposed establishment of a new governance body, Environmental Standards Scotland (ESS), to replace the system of environmental governance provided by the institutions of the European Union which will be lost at the end of the transition.

This new governance body should be fully independent and adequately resourced. It should be able to take complaints from the public and initiate its own investigations. It should be backed up by strong environmental principles and have sufficient legal powers to enforce the law and hold government and its agencies to account.

The role of the new independent body must be four-fold: reporting, advising, investigating, and enforcing. The independent body needs power to refer non-compliance to the courts, and the courts must be empowered to act on this. Scrutiny needs to be undertaken with Audit Scotland-type accountability. The independent body needs to be properly resourced (including financially and access to expertise) and be able to comment on the resources and performance of other bodies in relation to environmental standards.

There is the potential to lose clarity on what should be reported on at different levels (e.g. international level including the Bern convention, UK-level reporting, and how Scottish national reporting will fit into this). There will need to be a mechanism for reporting at these various levels. However, it does not necessarily have to be new if we already have something that works effectively. CIEEM is highly supportive of the ongoing role of the Joint Nature Conservation Committee (JNCC) to gather and report on UK-level nature conservation data for European and international obligations.

In terms of reporting, Scotland will need to decide if it will continue to align with EU reporting frameworks, and/or working in collaboration with the European Environment Agency. CIEEM is supportive of both. We are also highly supportive of ongoing membership of the European Environment Agency.

The loss of EU enforcement powers will be significant, hence Environmental Standards Scotland has to have powers to remedy and refer issues to the Scottish courts. This process must be accessible to all. CIEEM would like to see the environmental principles enshrined in law, and ESS to hold Scottish Government and all public bodies accountable for implementing environmental policy and legislation. CIEEM recommends that ESS reports to the Scottish Parliament. This will include drafting its own strategy and budget, which are approved by the Scottish Parliament. In addition, the body's Chair, Board and senior staff should all be appointed by the Scottish Parliament. Combined, these elements will ensure that the body remains independent of the Government and yet still accountable.

We note that ESS will have powers to issue compliance notices where the law is not being complied with in relation to regulatory functions and to make improvement reports where there is non-compliance or a failure to make environmental law effective. Compliance notices can be enforced through the courts and implementation reports require the Scottish Ministers to prepare an improvement plan in response. ESS will also have the power in serious cases to seek judicial review or to intervene in other litigation. Further details on how compliance issues will be handled and the timescales involved need to be laid out. If compliance notices and enforcement is not carried out in a timely manner then long lasting environmental damage will occur.

General

- Consultation on the Bill
- The adequacy of the impact assessments and statements including on sustainable development, equalities and human rights
- The costs associated with the provisions

In the development of the Bill we would like to see further proactive engagement with stakeholders and not just a formal consultation and parliamentary approval.

The loss of the EU complaint mechanism would lead to another layer of scrutiny which needs to be replicated in accordance with the Aarhus Convention and public access to environmental justice. Existing mechanisms have played an invaluable role in giving a voice to the public on environmental matters and holding governments to account. The new independent body will be required to receive complaints from the public regarding the failure of public bodies to implement environmental policy and legislation. We are pleased to see that ESS will be empowered to investigate matters on the basis of representations from any person.

We would like to highlight concerns regarding the limited timescale to get these arrangements in place before the transition period ends at the end of the year and Brexit takes full effect.